In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

EDWARD J. PRINCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, EDWARD J. PRINCE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 12, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered July 12, 1974. A timely Motion for Rehearing was denied without written opinion on October 1, 1974. A copy of such notification appears in the appendix hereto. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

1. Whether it is a violation of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States to not be confronted by the witnesses against Petitioner and Petitioner not be permitted to cross-examine such witnesses?

2. Whether it is a violation of Petitioner's rights under the Fifth Amendment to have hearsay testimony about a completely unrelated conspiracy be heard by a jury considering Petitioner's guilt or innocence of participating in an alleged conspiracy which was totally unconnected with the conspiracy testified about?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was convicted on one count of violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C., Sec. 77q (a), two counts of mail fraud, 18 U.S.C., Sec. 1341, and one count of violation of the conspiracy statute, 18 U.S.C., Sec. 371, although Petitioner had actually been charged in the indictment with forty-two separate counts. Another defendant was convicted on seventeen counts and the jury was unable to reach a verdict as to two other defendants.

Critical to the conviction of Petitioner in this case was the admission of innumerable hearsay declarations of co-conspirators and the admission of an out of court declaration of a co-indictee. The complained of hearsay declarations were not made in furtherance of any alleged conspiracy, were highly prejudicial to Petitioner, were all admitted over vigorous and repeated objections of Petitioner, and included the following examples:

> A. One of the secretaries for the involved corporate entity testified about a conversation she had with co-indictee Warren Stepp. Stepp gave her a brief case and instructed her to guard it. She asked if it had gold bricks in it and he answered, "Well, something like that". Later she was in his office and saw stacks of cash on his desk. This testimony was obviously inflammatory but the facts related, if true, were certainly not in the furtherance of a conspiracy.
>
> B. Another secretary testified about a conversation she had with co-indictee Neva Jackson. Co-indictee Wallace L. Hammer was said to have said that he had

trouble sleeping because so much money was under his mattress. Again the prejudicial nature of the statement is apparent but it is not a declaration in furtherance of a conspiracy.

C. There was further testimony that co-indictee Neva Jackson said it would be worth going to the penitentiary for two or three years if one could come out with a good bit of money salted away. Since Petitioner freely admitted making considerable money through the sale of corporate stock but denied knowingly participating in any fraudulent aspects of the transactions, this statement of Jackson must have had a tremendous adverse impact on the jury when deliberating Petitioner's guilt or innocence.

D. A witness was allowed to testify as to an out-of-court admission of co-indictee Neva Jackson. The gist of the statement was an instruction to advise inquiring stock brokers that there were no restrictions on the sale of, *not the subject corporate stock* (United Australian Oil), but the stock of another unrelated and unconnected corporation (Pacific Fidelity Corporation) located in Las Vegas, Nevada! This declaration was hearsay and incriminatory and had absolutely nothing to do with the conspiracy with which Petitioner was charged. Further, Petitioner had no opportunity to cross-examine the declarant since she was a co-defendant in the indictment against Petitioner.

The cumulative impact of these hearsay declarations and the out-of-court admission by a co-indictee, covering a completely unrelated and unconnected conspiracy, greatly affected the jury and prevented Petitioner from receiving a fair trial.

Consequently, Petitioner was convicted and received a three year prison sentence, $15,000 in fines and five years of probation after release from confinement.

REASONS FOR GRANTING THE WRIT

1. Permitting the jury to hear testimony about an out-of-court admission of a non-testifying co-indictee when the admission covered a completely unrelated and unconnected conspiracy denied Petitioner his Sixth Amendment Right to confront the witness against him.

Simple hearsay is incompetent evidence. When such hearsay is an inculpatory statement by a co-defendant, the damage is much more severe. A purported statement by co-defendant Neva Jackson, testified about by yet another person, that inquiring stock brokers should be informed that there were no restrictions on the sale of stock other than the corporate stock in question was such a severely damaging statement. It was pure hearsay and extremely incriminatory. At the time of the trial of Petitioner and three other co-defendants, co-defendant Jackson had forty-one counts pending against her and could not, therefore, be called as a witness by Petitioner. The right of an accused to confront witnesses against him is guaranteed by the Sixth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Bruton v. United States*, 391 U.S. 123 (1968).

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the "accuracy of the truth-determining process" * * * (I)ts denial or significant diminution calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

Because Petitioner was denied the right to confront the witness Neva Jackson in violation of his Sixth Amendment Right to do so, Petitioner was denied a fair trial.

Since the hearsay statement involved was also about another unrelated and unconnected conspiracy, the United States Court of Appeals for the Fifth Circuit, on Page 5712

of its opinion, announced a new rule of law pertaining to the admission of hearsay and conspiracy cases, but such expanded innovation in the law is not made clear for guidance by the bench and bar. The Court therein erroneously concluded that the challenged testimony relating to statements by apparent co-conspirators were made in furtherance of *the* conspiracy and were, therefore, admissible.

While Petitioner disagrees with the announced rule *intended*, the opinion should be reviewed by the Supreme Court of the United States, under the facts of the case, to clarify the holding that statements are admissable if made in furtherance of *any* conspiracy, whether such conspiracy was that charged in the indictment or not. This was the thrust of the government's oral argument on appeal. For the benefit of the bench and bar, it is urged that the Supreme Court either clarify the decision or adhere to the traditional conspiracy-hearsay rules and reverse.

If it be the former, then the factual basis recorded in Pages 755-768 of the Trial Record should be reflected in a clarified opinion. This portion of the record relates to the hearsay statements made by Neva Jackson, one of the conspirators in the U.A.O. conspiracy, to Barbara Jean Moon of Pacific Fidelity Corporation, located in Las Vegas, Nevada. The activities of Pacific Fidelity constituted no part of the alleged conspiracy in this case. The running hearsay statements, reflected by such record, from Jackson to Moon, may best be described as a training course for Moon to thereby enable Moon to engage in a similar transaction for Pacific. Therefore, while one could well say that these hearsay statements were made in furtherance of a conspiracy, it was certainly not the one charged in the indictment. Further, the government itself has never contended that Petitioner was ever involved in or a part of the Pacific conspiracy. The trial judge appreciated the posture projected by the government, but refused to grant a mistrial (R. 767-768).

The Fifth Circuit, of course, had and has the power to promulgate such a new rule, but it is suggested that such runs contrary to the constitutional mandate contained in the Sixth Amendment to the Constitution of the United States assuring this Petitioner the right to effective counsel and confrontation. It would seem inconceivable that counsel could be expected to be prepared to defend against conspiracies not charged in the indictment to which his client was not a party. The better rule, it would seem, would be the traditional, namely, that such statements are admissible only if made in the course of and in furtherance of the conspiracy charged in the indictment. See *Krulewitch v. United States*, 336 U.S. 440 (1949); *Dutton v. Evans*, 400 U.S. 74 (1970); *United States v. Nall*, 437 F. 2d 1177 (5th Cir., 1971). Traditional rulings governing the admission of conspiratorial statements, cited hereafter, rest upon the logical basis that unless the questioned statement is made for the purpose of inducing action relating to the conspiracy charged, it is simply inadmissable hearsay.

The undersigned counsel for Petitioner is satisfied that the Supreme Court will not permit the concealment of such new rule of law in the language of the old and thereby deprive all, but the instant litigants, of the sense of the new.

2. Admission into evidence of hearsay declarations of alleged conspirators that were not made in furtherance of any conspiracy but which were inflamatory and prejudicial deprived Petitioner of a fair trial and the due process of law as guaranteed by the Fifth Amendment.

As shown in the cited examples, as well as many other times, the trial court allowed numerous hearsay declarations, which were not made in the furtherance of any conspiracy, into evidence. It is a longstanding rule that such statements are admissible only if made in the course of and in furtherance of the conspiracy. *Krulewitch v. United States*, 336

U.S. 440 (1949); *Dutton v. Evans*, 400 U.S. 74 (1970); *United States v. Nall*, 437 F. 2d 1177 (5th Cir. 1971).

Merely narrative declarations do not fit within the rule of law governing the admission of conspiratorial statements. *United States v. Borelli*, 336 F. 2d 376 (2nd Cir., 1964). To be in furtherance of the conspiracy the statement must be used in an attempt to advance an object of the conspiracy. *United States v. Harrell*, 436 F. 2d 606 (5th Cir., 1970); *United States v. Penny*, 416 F. 2d 850 (6th Cir., 1969). To be an attempt to advance an object of the conspiracy, the statement must deal with overt acts to accomplish the goal, be a sales talk to induce a party to join the conspiracy or do an act for it, or be a threat to induce a co-conspirator to remain in the original conspiracy. Cf. *United States v. Bigos*, 459 F. 2d 639 (1st Cir., 1972); *United States v. Nasse*, 432 F. 2d 1293 (7th Cir., 1970).

The danger of hearsay declarations of co-conspirators is monumental. A witness is technically before the jury yet defense counsel has no opportunity to examine the missing declarent. The rule allowing admission of hearsay declarations made in furtherance of the conspiracy cannot be used to erode due process and the concept of a fair trial. It must be a limited rule and not a blunderbuss method of allowing otherwise inadmissible and inflammatory hearsay. The rule is based on an agency principle; the declarations of one party to a conspiracy are attributable to all if they are concerned with the criminal activity itself. This rationale does not justify the blatantly prejudicial hearsay herein complained of, hearsay not in furtherance of a conspiracy.

Because Petitioner was denied the right to confront the cited witnesses, Petitioner was denied a fair trial in violation of his Sixth Amendment Right to confront such witnesses and because the cumulative effect of such admitted hearsay evidence was contrary to Petitioner's right to due process of law, his Fifth Amendment Right to such due process was violated.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

EMMETT COLVIN,
COLVIN, JACKSON & HENDLEY,
1100 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, EMMETT COLVIN, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D. C., by placing a copy of same in the United States Mail, postage prepaid, on this the day of October, 1974.

EMMETT COLVIN,
COLVIN, JACKSON & HENDLEY,
1100 Adolphus Tower,
Dallas, Texas 75202,
Attorney for Petitioner.

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

October 1, 1974

TO ALL COUNSEL OF RECORD

Re: 73-2764 U.S.A. v. PRINCE

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By ANNE G. PARENT
Deputy Clerk

cc: Mr. Emmett Colvin
Mr. Neal B. Wheeler
Mr. Wallace L. Hammer
Mr. Frank D. McCown
Mr. Richard D. Kibby

*As to Edward J. Prince

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

Edward J. PRINCE and Wallace L. Hammer, a/k/a J. B. Roach, Defendants-Appellants.

No. 73-2764.

United States Court of Appeals, Fifth Circuit.

July 12, 1974.

Defendants were convicted in the United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., for violation of antifraud and registration provisions of securities law, mail fraud law, and law relating to conspiracy to defraud United States. They appealed. The Court of Appeals, Thornberry, Circuit Judge, held that substantial evidence supported finding that defendants possessed requisite intent or knowledge to violate law and that evidence of extrajudicial statements was properly admitted under co-conspirator exception to hearsay rule.

1. Conspiracy key 47(6)
Post Office key 49(11)
Securities Regulation key 199

Evidence in prosecution for violations of antifraud and registration provisions of securities law, mail fraud law, and law respecting conspiracy to defraud United States supported finding that defendants possessed requisite intent and knowledge and participated in conspiracy. Securities Act of 1933, §§ 5(a), 17(a), 15 U.S.C.A. §§ 77e(a), 77q(a); 18 U.S.C.A. §§ 371, 1341.

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2. Conspiracy *key*47(2)

Direct proof of defendant's state of mind or participation in criminal conspiracy is not required; intent, knowledge, and participation in conspiracy may be inferred from activities of parties and thus may be proved by circumstantial evidence.

3. Conspiracy *key*47(1)

Government has not met its burden in conspiracy prosecution where reasonably minded jurors must resort to conjecture or where evidence is not inconsistent with hypothesis of defendant's innocence.

4. Criminal Law *key*423(1)

Statements by coconspirators concerning cash that scheme had generated, procedure by which stockbrokers' questions concerning share restrictions should be answered, destruction of records, possibility of further inquiry by SEC, and threats to insure silence within group were made in furtherance of conspiracy, and evidence respecting such statements was therefore admissible, under coconspirator exception to hearsay rule, in prosecution for violations of antifraud and registration provisions of securities law, mail fraud law, and law relating to conspiracy to defraud United States. Securities Act of 1933, §§ 5(a), 17(a), 15 U.S.C.A. §§ 77e(a), 77q(a); 18 U.S.C.A. §§ 371, 1341.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, THORNBERRY, and SIMPSON, Circuit Judges.

THORNBERRY, Circuit Judge:

Wallace Hammer and Edward Prince were charged in a forty-two count indictment with violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77q(a), the mail fraud statute, 18 U.S.C. § 1341, registration provisions of the Securities Act of 1933, 15 U.S.C. § 77e(a), and

the conspiracy statute, 18 U.S.C. § 371.[1] Appellant Hammer was convicted by a jury on seventeen counts: five for violating the anti-fraud provisions, eight for violating the mail fraud

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1. 15 U.S.C. § 77q(a) provides in pertinent part:

§ 77q. *Fraudulent interstate transactions*

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

18 U.S.C. § 1341 provides:

§ 1341. *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than 1,000 or imprisoned not more than five years, or both.

15 U.S.C § 77e provides in pertinent part:

§ 77e. *Prohibitions relating to interstate commerce and the mails*

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

statute, three for violating the registration provisions, and one for violating the conspiracy statute. On the three counts charging violations of the registration provisions, the district court granted Hammer's post-conviction motion for a judgment of acquittal because the prosecution had failed to prove that the stock was not exempted from the registration requirements of the Act. Hammer was sentenced to serve five-year concurrent sentences on each of twelve counts, fined $5,000 on each of two counts, and placed on probation for the five years following his incarceration.

Appellant Prince was convicted on a total of four counts: one for violating the anti-fraud provisions, two for violating the mail fraud statute, and one for violating the conspiracy statute. He was sentenced to three years in prison, $15,000 in fines, and five years probation following his release. Two other defendants were tried with the appellants, but as to them, the jury was unable to reach a verdict.

[1] Neither appellant denies that there was a conspiracy in violation of 18 U.S.C. § 371. Nor does either deny that there was a scheme to defraud persons in the offer and sale of securities in violation of 15 U.S.C. § 77q and 18 U.S.C. § 1341. To be sure, the evidence in this record indicates a securities fraud operation of massive proportions. Rather, each appellant contends that he was not a knowing participant in the conspiracy, and on the counts not requiring conspiratorial conduct, that he lacked the requisite intent or knowledge to violate the law. Both appellants also contend that the district

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18 U.S.C. § 371 provides:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

court erred in overruling their objections to the admission of co-conspirator hearsay declarations.[2]

Viewed in the light most favorable to the verdict, Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680, the evidence leaves little room for conjecture on appellants' first contention. In August of 1967, two men named Todd and Farr acquied control of United Australian Oil, Inc., (UAO) by exchanging $80,000 worth of property, notes, and cash for 820,000 shares of UAO stock then owned by Nortex Oil and Gas Corporation. From the moment of its quiet acquisition until its ignominious denouement, UAO was nothing but a shell corporation, valuable only as a vehicle for future corporate activity. Although the corporation had a large number of public shareholders at the time of acquisition by Todd and Farr, it had no assets of any value. In fact, Nortex Oil and Gas Corporation had listed UAO on its financial books as having no value.

The modus operandi employed by UAO insiders was clearly described by the testimony and the exhibits introduced below. Within weeks of the takeover, nearly worthless assets were placed in UAO by Todd and his associates, including appellant Hammer, in return for large blocks of stock. A materially misleading letter was then prepared and distributed to UAO shareholders throughout the nation announcing these acquisitions, and predicting a rosy future for the corporation and its shareholders. In the year that followed, the appellants and other insiders sold at least 17 million

2. In addition, Hammer separately contends that the trial court erred in granting a judgment of acquittal on three counts after the jury had found him guilty rather than before, that the district court erred in giving certain supplemental instructions with respect to these three counts, that the district court erred in giving an *Allen* charge, that the district court erred in permitting the government to cross examine the appellant's character witness with regard to Hammer's tax evasion conviction then on appeal, and erred in permitting another federal district judge of the same court to correct an illegal sentence by imposing $5,000 fines on each of two counts instead of one $10,000 fine. We find no merit in any of these contentions. *See* Michelson v. United States, 1948, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168; United States v. Bailey, 5th Cir. 1972, 468 F. 2d 652, aff'd en banc, 5th Cir. 1973, 480 F. 2d 518; F.R. Crim. P. 35.

shares of unregistered stock to the public for a total of $4,657,716.60.

In November of 1967, a shareholder's report was prepared reflecting current assets of over a million dollars. An independent attorney advised UAO officials that, since the corporation had more than 500 shareholders and now more than a million dollars in assets, registration with the SEC was required. This report was never mailed to UAO stockholders. Instead, a new report, showing assets of $966,216.28, was prepared and mailed to UAO stockholders along with a stock rights offering.

In the fall of 1968, Hammer requested Prince to prepare a report announcing UAO's acquisition of a gold mine, and Prince performed. The report enthusiastically quoted what was portrayed to be an engineer's report which stated that the mine had at least $40,000,000 worth of gold in it, along with other assorted ores. The report, however, painted a nonexisting reality. UAO had acquired an option to acquire an option on the "gold mine" early in 1968, but the option had expired unexercised before the publicly announced "acquisition." The engineer quoted in the report had been dead for years and the quotation from the engineer's report related to a claim which was not even included in the option. Last but not least, the mine was worthless.

Prince testified at the trial that he sold valuable timber rights to UAO for UAO stock. He contends that he was merely the "innocent dupe" of other, more sophisticated UAO insiders who admittedly were engaging in a large scale fraud on the public, and that this bona fide business transaction proves his innocence. In the circumstances revealed by the record, Prince's contention strikes us as singularly hollow and without any merit. First, although Prince claimed that the corporation had agreed to exchange stock for timber, he admitted that there was no written agreement to that effect. In fact, although Prince received UAO stock, he did not convey his timber rights to the corporation. Instead, he sold the timber to others outside the corporation and kept the proceeds. Second, in the single year which forms the life of

this criminal enterprise, Prince sold 4,505,000 shares of UAO stock in his own name for $1,219,607.35, and an additional 400,000 shares listed in the name of Farr. On these sales, he received the rather generous commission of 15% to 25% of proceeds. None of the proceeds ever found their way into UAO corporate coffers. Instead, the proceeds less commissions were delivered to Hammer and others. Prince used at least some of the proceeds to purchase ten Cadillacs and two Buick Rivieras on behalf of UAO insiders. Finally, Prince had been a municipal bond dealer in the heart of the Chicago financial district for over forty years. Thus we are faced with a man of accumulated business acumen, who dealt in bonds, prepared a patently fraudulent report without making the slightest effort to ascertain its truthfulness, sold over four million shares of an unregistered stock at an extraordinary premium, sold valuable timber rights to a corporation without written evidence of any agreement, and paradoxically sold the same timber to other parties retaining both the UAO stock and the proceeds from the timber sold.

Hammer was variously described in the trial testimony as Todd's "agent" or "associate," as the "office manager," and as a UAO vice president. He was associated with UAO from the moment of Todd's acquisition, and evidently worked very closely with Todd. He directed Prince to prepare the fraudulent report on the gold mine. He directed a UAO secretary to issue to him blank stock certificates. He personally sold over 150,000 shares of UAO stock. Several witnesses testified that Hammer was the distributor of the proceeds from the sales of UAO stock by other insiders. Other witnesses testified that Hammer had threatened and intimidated several persons with regard to an SEC investigation of UAO.

With respect to each of the challenged convictions, we must sustain the verdict if there is substantial evidence, direct or circumstantial, to support it. "Substantial evidence" in this context means evidence that a reasonably minded jury could accept as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt. United States v. Barfield, 5th Cir. 1971, 447 F. 2d 85; United

States v. Reid, 5th Cir. 1971, 441 F. 2d 1089; United States v. Warner, 5th Cir. 1971, 441 F. 2d 821; United States v. Bass, 5th Cir. 1974, 490 F. 2d 846. We reiterate, however, that the appellants are challenging the sufficiency of the evidence with regard to only one element of the crimes charged; the required state of mind. The appellants allege not only that they lacked the specific intent to do what is proscribed by the mail fraud statute or the anti-fraud provisions of the Securities Act of 1933, but also that they were not knowing participants in the conspiracy.[3]

[2, 3] Each of the statutory offenses for which the appellants were convicted requires specific intent. See Estep v. United States, 5th Cir. 1955, 223 F. 2d 19, cert. denied, 350 U.S. 863, 76 S. Ct. 105, 100 L. Ed. 765; Blachly v. United States, 5th Cir. 1967, 380 F. 2d 665; United States v. Vandersee, 3rd Cir. 1960, 279 F. 2d 176, 179, cert. denied, 1961, 364 U.S. 943, 81 S. Ct. 463, 5 L. Ed. 2d 374; United States v. Marine, 7th Cir. 1969, 413 F. 2d 214, 216, cert. denied, 1970, 396 U.S. 1001, 90 S. Ct. 550, 24 L. Ed. 2d 493. But of course, direct proof of the appellant's state of mind or participation in a criminal conspiracy is not required. Blachly v. United States, supra; Glasser v. United States, supra, 315 U.S. at 80, S. Ct. at 469. Intent, knowledge, and participation in a conspiracy may be inferred from the activities of the parties and thus may be proved by circumstantial evidence. As the district judge noted in her charge, state of mind can rarely be established by any other means. *See also* Gusow v. United States, 10th Cir. 1965, 347 F. 2d 755, 759-760; Aiken v. United States, 4th Cir. 1939, 108 F. 2d 182, 183. This does not mean that the government has met its burden where

3. They readily admit, however, the existence of an illegal conspiracy. And once such a conspiracy has been established, only slight evidence is required to connect an individual with it. United States v. Fontenot, 5th Cir. 1973, 483 F. 2d 315, 321; United States v. Edwards, 5th Cir. 1974, 488 F. 2d 1154, 1157. But guilt may not be inferred from mere association. To establish criminal conspiratorial conduct, the proof must show that each appellant agreed with one or more persons to do what is proscribed by the mail fraud statute or the anti-fraud provisions of the Securities Act, and it must show an overt act by one conspirator in furtherance of that agreement. United States v. Edwards, supra.

reasonably minded jurors must resort to conjecture or where the evidence is not inconsistent with the hypothesis of the accused's innocence. It does mean that our criminal jurisprudence ascribes much weight to the words and conduct of those accused of crimes. In the words of Justice Holmes, even a dog distinguishes between being stumbled over and being kicked. Holmes, The Common Law, p. 3 (1881 ed.). Based upon the record evidence, we think it was clearly a jury question whether each appellant possessed the requisite intent and knowledge and participated in the conspiracy. Blachly v. United States, supra; Glasser v. United States, supra; United States v. Apollo, 5th Cir. 1973, 476 F. 2d 156, 162.

[4] Both appellants objected to the admission of hearsay declarations of co-conspirators on the ground that the admitted statements were not made in furtherance of the conspiracy. The challenged testimony consisted of statements by co-conspirators concerning the cash that the scheme had generated, the procedure by which stockbrokers' questions concerning share restrictions should be answered, the destruction of records, the possibility of further inquiry by the SEC, and threats made by conspirators to insure silence within the group. Having studied the record and the context in which the remarks and the testimony were made, we conclude that the statements were made in furtherance of the conspiracy and were therefore admissible. See United States v. Nall, 5th Cir. 1971, 437 F. 2d 1177, 1182-1183; United States v. Harrell, 5th Cir. 1970, 436 F. 2d 606, 613; United States v. Johnson, 5th Cir. 1972, 466 F. 2d 508; Dutton v. Evans, 1970, 400 U.S. 74, 81, 91 S. Ct. 210, 215, 27 L. Ed. 2d 213; Lutwak v. United States, 1953, 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593.

The convictions are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-484

EDWARD J. PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that certain statements of co-conspirators were not made in furtherance of the conspiracy and that he was denied his right to confront these witnesses.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77q(a), two counts of mail fraud in violation of 18 U.S.C. 1341, and one count of conspiracy (to violate 15 U.S.C. 77e(a)(1), (2), and 77q(a) and 18 U.S.C. 2 and 1341) in violation of 18 U.S.C. 371. He was fined $15,000 and sentenced to a term of three years' imprisonment, to be followed by five years of probation. The court of appeals affirmed (496 F. 2d 1289; Pet. App. B).

The court described in detail the elaborate scheme to defraud the public in the offer and sale of United Australian Oil, Inc. (UAO) stock. Briefly summarized, the scheme commenced in August 1967, when Hardy Todd and Charles Farr acquired a controlling block of 820,000 shares of unregistered UAO stock from Nortex Oil and Gas Corporation (Nortex) for $80,000 (A. 550-561).[1] Although UAO had many public shareholders, it was a shell corporation with few assets (A. 561). In fact, Nortex listed the UAO stock on its financial books as worthless (A. 561).

Soon after acquiring control, Todd and his associates placed nearly worthless assets into UAO in return for large additional blocks of stock (A. 274-275, 291, 398, 407, 417-419, 432-433, 535-536, 637-638, 642, 707). A materially misleading letter describing these acquisitions by UAO and projecting a bright future for the company was sent to shareholders (A. 431-434). Petitioner prepared a report announcing UAO's purchase of a gold mine reportedly worth in excess of 40 million dollars (A. 1113-1116, 1121-1122). In order to substantiate this valuation, petitioner quoted from a long-deceased engineer's report, which actually related to another mining claim (A. 292, 327-329). The mine was worthless (A. 655). In fact, UAO never intended to purchase the mine; it permitted its option to expire before petitioner began preparation of his report (A. 707-708). After a few minor changes, however, petitioner's report was mailed to brokers throughout the country (A. 291-292, 326-329, 621).

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[1] "A." refers to the Appendix filed in the court of appeals.

During the course of these deceptions, over 17 million shares of UAO were sold to the public for more than four and one-half million dollars (A. 856-858, 933-937, 942, 976).[2] Petitioner sold approximately 4,505,000 of these shares and received a commission on each sale of 15-25%, totaling more than $250,000 (A. 957-959, 1099-1100, 1118).[3] The bulk of the proceeds, less petitioner's commission, were transmitted to Wallace Hammer, an associate of Todd, in cash or by cashier's checks made payable to fictitious persons (A. 310, 674, 679, 865-872, 888-894, 911-917, 1080-1081, 1085-1090). Petitioner used the remainder of the proceeds, less his commission, to purchase ten Cadillacs and two Buick Rivieras for UAO insiders (A. 258, 308, 742-743, 1076-1077).

The hearsay statements that petitioner challenges all relate to the cash generated by the fraudulent scheme and the procedure followed by the UAO transfer agent in handling inquiries concerning restrictions on the sale of the stock. Contrary to petitioner's contention, however, these statements were made during and in furtherance of the ongoing conspiracy of which petitioner was found

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[2]A confirmation for the purchase of 1,000 shares of UAO stock mailed by Sanders and Company to William C. Motes and Billie F. Motes and a check mailed by Ervin Radke to Sanders and Company provided the basis for the mail fraud counts (A. 330-331, 922-923).

[3]Petitioner claimed that he received proceeds from the stock in return for valuable timber rights that he sold to UAO (A. 1074-1075). However, no written agreement of this sale existed. Moreover, petitioner later sold his land and its timber to individuals outside UAO and retained the entire proceeds (A. 1098, 1117-1118).

to be a part.[4] See *United States* v. *Littman*, 421 F. 2d 981, 982-983 (C.A. 2), certiorari denied, 400 U.S. 991; *United States* v. *Baker*, 419 F. 2d 83, 89 (C.A. 2), certiorari denied *sub nom. DiNorscio* v. *United States*, 397 U.S. 971; *United States* v. *Hickey*, 360 F. 2d 127, 140-141 (C.A. 7), certiorari denied, 385 U.S. 928. In admitting them into evidence, the court applied the well-established rule that a co-conspirator's hearsay declaration is admissible against other conspirators if made in furtherance of the conspiracy. *Dutton* v. *Evans*, 400 U.S. 74, 81.

Petitioner's further contention that such admissions violated his Sixth Amendment right to confrontation has been expressly rejected by this Court. See *Dutton* v. *Evans, supra*, 400 U.S. at 80-82; *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974. Moreover, Neva Jackson, the UAO transfer agent and declarant of two challenged statements, had been granted immunity prior to trial pursuant to 18 U.S.C. 6002 and therefore could have been called as a witness by petitioner (A. 124-130).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[4]Petitioner contends that the court extended the traditional rule of admissibility to include hearsay statements made in furtherance of *any* conspiracy rather than restricting admissibility only to those statements made in furtherance of the conspiracy charged in the indictment (Pet. 4-7). He bases this assertion upon a statement attributed to Neva Jackson, which, he contends, referred to a conspiracy in the sale of Pacific Fidelity Corporation stock rather than UAO stock. The court, however, ruled that statement inadmissible when its relationship to Pacific Fidelity was brought out (A. 766-768). The court ruled Jackson's conversation admissible when it was presented to show the method she followed in UAO stock transactions (A. 300, 1007).